must not be substituted for the witness stand. That right is enshrined in our Constitution — "No person shall be deprived of his life, or personal liberty save in accordance with law." That fundamental right implies that no person is punishable or can be lawfully made to suffer in body except for a distinct breach of law proved in a court of law. All this reduces to the minimum the possibility of arbitrariness and oppression.

Normally an appellate court is reluctant to interfere with sentence imposed by a lower court. But it is bound to do so whenever it feels that justice does not appear to have been done. In Criminal Appeals No. 30 and No. 31 of 1972 I am of the view that the learned president had weighed too heavily in favour of the respondent. This is what he said in his judgment:

"Before passing sentence, counsel for the prosecution addressed the court and stated, among other things, that a just and fair sentence was required and urged that the interest of the public as well as the position of the accused must be taken into account by the court. 'Position of the accused' in this context could only mean the status of the accused as a Prince of the ruling house of the State of Johore, the fact that he is the eldest son of His Highness the Sultan of the State of Johore which is a component part of the States of Malaya, that fact that the title of Raja Muda of Johore had been conferred on him and that the accused held a rank of importance in the Johore Military Forces."

He had thereby conflicted with the provisions of article 8 of our Constitution which says that all persons are equal before the law. That implies that there is only one kind of law in the country to which all citizens are amenable. With us, every citizen, irrespective of his official or social status, is under the same responsibility for every act done without legal justification. This equality of all in the eyes of the law minimizes tyranny.

It is well settled that the sentence must reflect the gravity of the offence. In the present case it is not so much the triviality of the injury but the circumstances culminating in the commission of the offence which are of importance. In my judgment the sentence imposed by the learned president did not reflect the gravity of the offence and I here and now set aside the sentence imposed by the lower court in respect of these 2 appeals, and substitute them as follows: —

Criminal Appeal No. 30/72, fine of $500 in default 2 months imprisonment; conviction to be recorded.

Criminal Appeal No. 31/72, First charge. I impose a fine of $1,000 in default 3 months imprisonment; conviction to be recorded.

In respect of second and third charges, I impose a fine of $500 each in default 3 months imprisonment; conviction to be recorded.

Orders accordingly.

TOK JWEE KEE v. TAY AH HOCK & SONS LTD. & ANOR.

[O.C.J. (Abdul Hamid J.) January 13, 1973]

[Johore Baharu — Civil Suit No. 213 of 1965]

Local Authority — Allegation that building plans were approved by Town Council contrary to provisions of Town Boards Enactment — Whether Town Council liable to owner of adjoining land — Liability of owner of land on which building is built — Town Boards Enactment (Johore No. 118), s. 145 — Building Bye-Laws 1973, bye-law 46.

In this case the plaintiff owned a bungalow on land in Johore Bahru. The first defendant owned a piece of land on the boundary of the plaintiff's land and had obtained approval to erect a block of four storey building, the plans for which were approved by the Town Council, Johor Bahru. The plaintiff claimed a declaration that the approval of the building plans by the Town Council was illegal and inoperative or in the alternative that the approval of the building plan was null and void as being *ultra vires* and was approved contrary to the rules of natural justice. He also claimed damages against the Town Council and the owner of the land on which the building was built. It was also alleged that there had been a breach of the building bye-laws and the plaintiff claimed damages arising from this breach. On a preliminary objection the High Court had held that even assuming the approval of the building plans by the Town Council was wrong, the plaintiff had no cause of action. An appeal against this ruling was allowed by the Federal Court ([1969] 1 M.L.J. 195) and it was ordered that the case be remitted back to the High Court for retrial of the issues of fact and determination of suit.

Held: (1) the onus was on the plaintiff to establish that there had been a breach of section 145 of the Town Board Enactment and on the evidence he had failed to discharge the burden, as the approved zoning plan showed that the building approved came within the class of building that may be permitted by the Town Council;

(2) the first defendant had committed a breach of bye-law 46 of the Town Boards Enactment in that he had failed to construct any effective hoarding sufficient to protect the public. He had also failed to comply with bye-law 46 and in the circumstances of the case was also negligent;

(3) on the evidence the plaintiff was entitled to damages of $1,505 against the first defendant.

Cases referred to:-

(1) *Tok Jwee Kwee* v. *Tay Ah Hock & Sons Ltd. & Anor.* [1969] 1 M.L.J. 195.

(2) *Ipoh Town Council and another* v. *Ng Khoon Khoon* [1960] M.L.J. 227.

(3) *District Council, Central, Province Wellesly* v. *Yeggapan* [1966] 2 M.L.J. 177.

CIVIL SUIT.

Datuk S. P. Seenivasagam for the plaintiff.

P. M. Williams for the first defendant.

Datuk D. C. Jackson for the second defendant.

Abdul Hamid J.: Tok Kwee Kee owns a bungalow in which he and his family occupy on Lot 6232 Certificate of Title No. 3978 known as No. 56-H, Jalan Ibrahim Sultan, Johore Baru. The first defendant owns a piece of land on the eastern boundary of the plaintiff's land. Both pieces of land are within the jurisdiction of the Johor Baru Town Council. When this action was instituted the first defendant was in the course of erecting on his land one block of four-storey building which building has since been completed. The first defendant received approval of the building plans on January 31 and June 8, 1965.

The plaintiff's claim is for a declaration that —

(a) the approval of the building plans by the Town Council was illegal and inoperative; and

(b) in the alternative, that the approval by the Town Council of the building plans was null and void as being ultra vires and was approved contrary to the rules of natural justice.

The plaintiff asks for —

(a) an order that the block be demolished;

(b) damages;

(c) costs; and

(d) such further or other relief as the court may deem just.

As against the first defendant the plaintiff alleges that the first defendant is in breach of statutory provision and/or is negligent. Paragraph 5 of the statement of claim reads as follows —

"In or about the month of May 1965 the 1st defendant commenced building operations on the Lot 6233 in accordance with the said building plans without proper safe-guard or precautions for the protection of the plaintiff and members of his family and his adjoining property as required by By-Law No. 46 of the Town Board By-Laws 1937 and on consequence of the breach of the By-Law and/or the negligence of the 1st defendant, his servants or agents the plaintiff suffered risk of bodily injury to his children and damage to his property, namely, the expanded metal-fence, roof, roof-gutters and window pane of his bungalow. In addition, cement plasters, broken bricks, granite stones and pieces of timber have fallen on to the plaintiff's land in the course of the erection of the 3 four-storey buildings by the 1st defendant, his servants or agents."

As against the Town Council the plaintiff says that these two pieces of land are within the residential zone of Johor Baru town and the approval of the building on the first defendant's land was contrary to the provisions of the Town Boards Enactment No. 118 and the Town Board By-laws 1937. The plaintiff particularises these provisions as sections 115A, 136, 137, 138, 143, 96 and 97 of the Enactment and By-laws 35, 30 and 10(i)(g). He also says that in consequence of the Town Council wrongfully approving the plans his property has been adversely affected and he has suffered damages.

Both the first defendant and the Town Council deny that the building plans were approved otherwise than in compliance of the Town Boards Enactment and the Town Board By-laws. The first defendant also states that, if as alleged, the plaintiff's property has been adversely affected and the plaintiff has suffered damage, the first defendant is not liable.

They also plead that the plaintiff's statement of claim discloses no cause of action and should be struck out as being frivolous and vexatious.

On October 30, 1967 preliminary objection was heard in this court whereby both defendants argued that even assuming the approval of the building plans by the Town Council was wrong, the plaintiff had no cause of action. The court agreed and struck off the plaintiff's claim. There was an appeal against the court's decision.

The judgment[1] of the Federal Court was delivered by Suffian F.J. His Lordship considered sections 136, 137, 138, 139, 140 and 145 of the Town Boards Enactment very carefully and then said —

"Section 145 is the all-important one in this case. That section reads:

'Effect of approved plan.

145. (i) The Board shall *refuse to approve* the plan of any new building .... unless such plan is in conformity with the approved plan.

(ii) ....'"

"It is clear that this section imposes on the Board a statutory duty and that the Board would be in breach of this duty if it approved a building plan not in conformity with an approved plan. Referring to the corresponding provision of the F.M.S. Town Boards Enactment (Cap. 137) in *Ipoh Town Council and Another* v. *Ng Khoon Khoon*, ([1960] M.L.J. 227) Thomson C.J. (as he then was) said at page 230:

'... by section 145 the Council *must*, where an approved plan exists, refuse to approve plans for any buildings which are not in conformity with the approved plan irrespective of whether or not the proposed building is in contravention of any by-law and irrespective of any views they may have as to the merits of an individual building.'"

His Lordship also made a thorough examination of the common law principles governing civil liability for breach of statutory duty. He held that in his judgment —

"... the duty imposed on the Johore Bahru Town Council by section 145 is owed not only to the public generally but to a broad class — a particular definable class of the public of which the plaintiff is one. When the Council zones an area for residential purposes, the zone benefits not only the inhabitants of the town generally, it benefits in particular the inhabitants of the zone. Persons buying land in the zone are prepared to pay an increased price because of the promise of peace and quiet and the attractions of living in a residential zone.

There is no remedy, civil or criminal, provided by the Enactment for any breach of section 145, nor does the Enactment even say that a complaint may be made to the State Authority. Therefore, if any breach by the Council of its duty under section 145 (either through oversight, ineptitude, indifference to the law or worse) results in damage to the owner of any adjoining land in a residential zone such as the plaintiff, he has, in my judgment, a civil remedy for damages against the Council."

The appeal against the Town Council was allowed. In allowing the appeal His Lordship had this to say about the By-laws —

"... There is, however, no provision cited to us corresponding to section 145 which makes it incumbent on the Council to comply with the duty, if any, imposed by any of these by-laws."

Allowing the appeal against the first defendant His Lordship held that —

"As regards the neighbour's liability, it is not alleged that it was liable for the wrongful approval of the building plan by the Town Council. It is alleged simply that it failed to take proper precautions as required by by-law 46 for the protection of the public while building operations were being carried on, and in consequence of the breach of that by-law and/or the negligence of the neighbour, its servants or agents, the plaintiff suffered risk of bodily injury to his children and damage to his property, and that cement plasters, etc., have fallen on to the plaintiff's land in the course of the building operations. This is an allegation that, because of the breach of by-law 46 and/or because of the negligence of and trespass by the neighbour, its servants or agents, the plaintiff suffered —

(a) risk of bodily injury to his children and

(b) damage to his property.

These are two distinct allegations. It is true that the allegation regarding (a) relates to injury *in futuro;* in my opinion, this does not entitle the plaintiff to bring now before the happening of the injury an action against the neighbour.

But the allegation regarding (b) is an allegation of a definite damage that has happened to the plaintiff's property caused either by the breach by the neighbour of by-law 46, and/or his negligence and trespass. This allegation, if true, may following the dictum in *Yegappan's case* ([1966] 2 M.L.J. 177) found a claim for damage."

The case is remitted back to this court for retrial of the issues of fact and determination of the suit in the light of the law set out in the Federal Court judgment and some of the facts to be investigated are as follows —

(a) Was the Council in breach of section 145 and if so what damage has been caused to the plaintiff by such breach? (There is no need to enquire whether or not the Council was also in breach of the bylaws).

(b) Was the neighbour in breach of by-law 46 and if so what damage has been caused to the plaintiff by such breach?

(c) Was the neighbour guilty of the tort of negligence (and/or, if the plaint is amended, trespass) towards the plaintiff and if so what damage has been caused to the plaintiff?

Evidence is adduced that Lot 6233 (first defendant's land) is zoned for residential purpose. It is coloured pink on the zoning plan (P1).

Chi Swee Guan Director of Planning Johor states that the fourth column under the Schedule shows other classes of building that may be permitted provided detailed plans for such uses are approved by the Town Council. It includes buildings such as shops, showrooms for cars and flats.

Counsel for the Town Council in his submission says that P1 clearly shows that under the approved zoning plan other classes of buildings can be erected and the Town Council in this case properly approved the building and site plan No. 114/64 and amendment plan 157/65. He further submits that the building erected by the first defendant is in fact being used only as shops and showroom for cars and residential flats as admitted by the plaintiff in paragraph 2 of the statement of claim. Counsel also contends that there is no evidence of the damage suffered by the plaintiff as a result of the Town Council allowing the first defendant's building to be built.

The onus, I think is on the plaintiff to establish that there was a breach of section 145 of the Town Board Enactment. On the evidence produced by the plaintiff I am not satisfied that he has discharged that burden. The approved zoning plan plainly shows that the building approved comes within that class of building that may be permitted by the Town Council.

Consequently it is unnecessary for me to consider the question of damages. However, even assuming there was such a breach (I have not so found) there is nonetheless no evidence whatsoever to establish that the plaintiff has suffered any damage. The only evidence is an assertion by the plaintiff himself that he had an offer of $70,000 for his house and that now he has no offer even up to $50,000. I am unable to accept that as sufficient proof of the damage suffered.

As for the claim against the first defendant, first, I shall consider whether there was a breach of by-law 46. By-law 46 reads as follows —

"Proper precautions shall be taken for the protection of the public whilst building operations are being carried on by the placing of a strong hoarding round the building when necessary, with lamps at those corners which abut on a street lighted and kept burning from sunset to sunrise. All building material shall be kept within such hoarding unless permission shall have been obtained from the Board under section 72 of the Enactment for the deposit of building materials."

"Hoarding" is defined by the Shorter Oxford English Dictionary as a temporary fence of boards enclosing a building while in the course of erection or repair.

It is purely a question of fact whether in the instant case there was such a hoarding placed round the building. The plaintiff states that when the building was in progress there was no precaution taken to prevent bricks, cement plaster, sand and pieces of timber from falling on to his property. He wrote a letter to the President of the Town Council complaining that the building operation had already commenced without any shoring precaution and had asked the Council to take immediate steps to shore up the area between the boundary of his house and the first defendant's land in order to prevent any damage or injury to his property and family. (See P3). The plaintiff says that subsequently he again wrote to the President of the Town Council vide letter dated September 4, 1965 (P6) through his solicitor stating that no proper safeguard had been made before the commencement of the building operations and that this absence was so apparent that an inspection at the building site would confirm it. He further states that the Council ought to have given directions for safety measures to be taken to prevent any injury or damage to the owner or occupiers of adjoining properties.

The plaintiff testifies that there was no hoarding constructed by the first defendant except for some timber structures which protruded on to his land over the fence. He then says that there were no wooden structures built by the first defendant. The wooden structures that were constructed in June was for purposes of the building referring, I think, to the scaffolding. Encik Abdul Hamid Haji Rahmat, a civil engineer, who served the Town Council, Johor Baru in 1965 testifies that he took action on this letter dated September 4, 1965. At the site he found evidence of dust and parts of brick falling into the compound of the plaintiff's house and that he saw a hole in the roof. As a result a notice was issued and served on the first defendant. Encik Abdul Hamid further says that he was not sure whether anything had been built to comply with the instruction.

On the other hand, Tay Ah Kee the first defendant states that before building a hoarding about 7 to 8 feet high and slanting towards the right hand side, that is, towards the plaintiff's house was built to prevent damage. Some pieces of timber which formed part of the hoarding protruded into the fence of the plaintiff's house and because of that the whole hoarding had to be pulled down. The hoarding depended on brotis for support. He further states that it was not

possible to construct a hoarding which could not protrude into the land of the plaintiff because of insufficient space between the building and the plaintiff's land.

When cross-examined by Datuk S. P. Seenivasagam the first defendant says that if the building was 10 feet from the boundary, hoarding could be constructed without encroaching on the plaintiff's land. In answer to further question put to him that he could not build effective hoarding because he built 2 feet away from the boundary, the first defendant replies that there was a way to prevent damage but because the plaintiff extended the height of his fencing, he was not able to do anything.

By-law 46 requires a builder to take proper precautions to protect the public when building operations are being carried on. To comply with the by-law the builder is required to construct a strong hoarding round the building. Any such hoarding must, if it is to serve as a protection to the public, not only be strong but effective. The first defendant says that he cannot comply with such requirement because there was insufficient room to construct the hoarding. Is that sufficient reason to relieve the first defendant from placing the hoarding? I firmly believe that that is not. The first defendant himself had chosen to construct the building so close to the boundary of the plaintiff's land. It is therefore for him to contrive means of compliance with the by-law. I appreciate the fact that the first defendant's failure to comply with the by-law was to some extent contributed by the plaintiff's objection to those wooden structures protruding into his land. Why shouldn't he object? It is, I think, perfectly within his right to raise the objection and there is no earthly reason why he should be blamed for wanting to protest not only his property but the safety of his family. Looking at all these as a whole I do not hesitate to say that the first defendant's failure to comply with the statutory requirement stems mainly from the very fact that he had no room whatever left on his side of the land for him to place a proper and effective hoarding.

To my mind, the first defendant has clearly committed a breach of by-law 46 of the Town Boards Enactment in that he had failed to construct any or any effective hoarding sufficient to protect the public. Furthermore he had failed to take proper steps to comply with by-law 46. From the circumstances of this case I am further of the view that the first defendant was also negligent.

As for damages suffered by the plaintiff, I am inclined to agree with the first defendant's counsel that the plaintiff has not given sufficient particulars of the damage. However, on the evidence produced before this court, I am satisfied that the plaintiff has proved that there was some damage to the old expanded metal fence for which he had to repair costing him around $200. I am also satisfied that there was some damage to the roof of the plaintiff's house which he repaired incurring some $825. From the testimony of Encik Abdul Hamid, a civil engineer, it is further apparent that dust and parts of brick had fallen into the plaintiff's compound when building operations were being carried on. It is reasonable to allow some of the expenses incurred by the plaintiff as labour charges for the removal of the articles such as broken bricks, stones, cement plasters, etc. I award a sum of $480.

For reasons which I have stated above I would therefore enter judgment for the plaintiff in regard to his claim against the first defendant in the sum of $1,505 and costs. I also allow 5% interest per annum with effect from January 1, 1966.

The claim against the second defendant is dismissed with costs.

Claim dismissed.

Solicitors: *Williams & Tennakoon; Jackson & Masacorale; S. Seenivasagam & Sons.*

HARBANS KAUR & ANOR. v. LO KUM SANG

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) October 24, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 30 of 1972]

Damages — Award — Contributory negligence — Interest on damages.

This was an appeal from the decision of the High Court (reported at [1972] 2 M.L.J. 196) wherein it was held that the respondent was 75% to blame for the accident which caused the death of the deceased and that the deceased was contributorily negligent to the extent of 25%. The court also disallowed interest. The appellants, administratratrix and co-administrator of the estate of the deceased, appealed to the Federal Court.

Held, allowing the appeal: (1) the finding of 25% contributory negligence on the part of the deceased should be set aside and the appellants do recover from the respondent the sum of $17,280 as general damages and the sum of $1,100 as special damages;

(2) the general damages do bear interest at the rate of 6% per annum from January 22, 1971 to March 10, 1972 and the special damages do bear interest at the rate of 3% per annum from February 25, 1969 to March 10, 1972.

FEDERAL COURT.

David Tay Seow Hai for the appellants.

Anwar bin Ismail for the respondent.

The Federal Court in this appeal did not deliver a written judgment.

Appeal allowed.

Solicitors: *Murphy & Dunbar; Shearn Delamore & Co.*